

Liberty Cable's suggestion for the Commission to ask Congress to amend § 19 of the 1992 Cable Act so that the program access provisions would apply to New York 1 News should be rejected. First, the suggestion that satellite-delivered programming will not be the pre-eminent means of delivering video signals to MVPDs in the future is extraordinarily naive. It is a simple fact that national programming distribution, and the economies achieved thereby, cannot be accomplished by any more efficient means than satellite-delivery. Indeed, all new national programming services that have been announced are expected to be satellite-delivered. With compression technology, it is even more likely--not less likely--that video programming will be satellite-delivered. 22/

Second, the legislative choice to apply the program-access provision only to satellite-delivered programming vendors was intentional. See S. Rep. No. 92, 102d Cong., 1st Sess. 28 (1991) (noting that program-access was "limited to national and regional cable programmers,

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22/ The fact that fiber optics are increasingly used in the delivery of video programming to subscribers has absolutely nothing to do with how programming vendors will deliver their programming to MVPDs in the future.

that is, programmers which license for distribution to more than one cable community"). 23/

Third, to require programming services like new York 1 News to be made available to all comers would plainly reduce the incentive for producing such programming. No cable operator would develop a local news network only to then be required to allow a competing MVPD to use the producer's programming against it. 24/

Liberty Cable also uses this forum to complain that "Time Warner insists on removing its own converter boxes and terminating its own lines"; that Time Warner often requires it to be established that a subscriber wants to terminate Time Warner service; and that Time Warner disparages Liberty Cable in its advertising practices in a "patently untruthful" manner. Liberty Cable at 17-18. The

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23/ In approving the exclusivity petition of New England Cable News ("NECN") (which is by the way a satellite-delivered service), the Commission recently recognized that, in contrast to national programmers, different considerations apply when a local or regional programmer is at issue. See 75 Rad. Reg. 2d (P & F) 350 (such services "by definition" have naturally more limited distribution potential that inherently place them in "a significantly more precarious financial condition than that of other competing programming services that enjoy broader audience appeal").

24/ Moreover, any disincentive against program-creation would be fundamentally at odds with an express goal of the 1992 Cable Act--to increase "diversity in the multichannel video programming market".

accusations are all baseless. If there were any merit to them, Liberty Cable would be asserting them in an appropriate forum.

First, there is nothing illegal about TWC seeking to remove its own property from an MDU or terminating its own lines. TWC does so to ensure the orderly return of its equipment (because it is aware of instances in which Liberty Cable has failed to return TWC's property). As for the termination of its lines, TWC does this to ensure (1) that a subscriber is in fact no longer receiving TWC's service and (2) that the line will not be subject to signal leakage.

Second, TWC has asked that subscribers indicate they want to disconnect service (either orally or in writing -- but not by affidavit), because Liberty Cable has made a practice of signing up MDUs to bulk contracts and then misrepresented to its occupants that they no longer have the option to receive service from TWC. By asking subscribers to request disconnects, TWC has the opportunity to correct that misrepresentation and reiterate its disconnection procedures. Third, TWC does advertise that cable-delivered video programming is superior in quality to programming delivered by SMATV technology; a part of that advertising has recognized that SMATV programming is more prone to outages than TWC's systems. TWC believes these facts to be

true, notwithstanding Liberty Cable's unsubstantiated claim that its picture is "objectively" better than that provided by its competitors. Certainly, TWC's advertising cannot be considered deceptive or misleading. It is simply good competition.

It is the notion of "good competition" that seems to be beyond Liberty Cable's comprehension. Liberty Cable's complaints here are in many respects about the essence of competition. Yet, in Liberty Cable's view, such competition (particularly when provided by TWC) is "anticompetitive". That skewed view of competition is misguided and it is of no value to the Commission in this proceeding.

Unlike Liberty Cable's particular allegations aimed at TWC, DirecTV, in Oliver Stone-like fashion, conjures up conspiracy allegations against the entire cable industry, citing its belief in a "continuing broader, multi-front campaign by cable . . . to use its market power to influence the development of emerging competition".

DirecTV 5. For example, DirecTV contends that the Primestar consent decree (between the Primestar partners and the States' Attorneys General) creates a "cable friendly regime" "far different than the framework created by Congress in the 1992 Cable Act".

DirecTV 6. DirecTV reiterates its concern that parties to the decree will argue "in proceedings such

as this" that the provisions of the decree are controlling interpretations of the program-access provisions.

DirecTV 6; see also DirecTV 7 ("cable interests and their benefactors have already come before the agency and attempted to use the Primestar Decrees affirmatively"). 25/

This paternalistic argument was made before the District Court in Primestar and rejected. It does not get any better with repetition here. First, the FCC is not bound by the terms of the decree. Second, the decree does not--and could not--immunize conduct that is contrary to the Cable Act or any other statute. Third, the decree nonetheless restates this truism by providing that where the Cable Act or the regulations promulgated thereunder prohibit certain conduct permitted under the decree, the Act and the regulations control. See Decree, § IV(A)(1)(g). 26/

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25/ During the Primestar proceedings, DirecTV took the position that there was an appropriate prophylactic measure that would preclude this possibility--rejecting the decrees.

26/ As part of its perception of a web-like "conspiracy", DirecTV does single out TWC on one point--for seeking to have its exclusive contract with Court TV declared to be in the public interest. Again, Congress plainly envisioned that parties would have the right to petition the Commission to have exclusives be declared in the public interest; it specifically created a process to do so. That TWC invoked that machinery unsuccessfully does not constitute evidence of any anticompetitive animus. In any event, the Court TV proceedings had nothing to do with preventing DirecTV from obtaining access to programming.

### III. FUTURE DATA COLLECTION.

Bell Atlantic indicates that LECs already must provide "[m]uch of the data" the Commission has specified in the NOI when filing Section 214 applications and tariffs for video dialtone service. Bell Atlantic 10. For that reason, Bell Atlantic suggests that such information should be required from all MVPDs. However, the Commission requires detailed information from LECs seeking to provide dialtone service, because it could not otherwise engage in any meaningful analysis of the competitive risks of a dialtone proposal (or meaningfully evaluate LECs' arguments as to how those risks will be minimized). Merely because common carriers must file such information does not mean that MVPDs (and specifically, cable operators) also should be required to file such information.

DirectTV recommends that the Commission gather from MSOs and vertically integrated entities the data of the type requested under the terms of the Primestar decree.

DirectTV 22. 27/ However, TWC agrees with those

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And, as evidence that TWC does not seek to use the Commission's rules to effect procedural delays, we note that TWC voluntarily withdrew its petition for exclusivity with respect to the Prime Ticket service.

27/ DirectTV also suggests that the Commission generally propound questions to vertically integrated entities that would discover whether they are party to contracts having clauses that affect pricing based on whether the programmer

commenters proposing that the Commission generally lacks authority to collect such data on a compulsory basis. And, for the reasons set forth in its opening comments, TWC 37-38, even if the Commission were empowered to do so, it should not.

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is doing business with DBS or another non-cable technology MVPD. Id. There is nothing in the 1992 Cable Act that would authorize such a procedure.

Conclusion

The Commission should reject the suggestions that the Cable Act and the Commission's efforts to implement it have not adequately advanced the interests of non-cable MVPDs. The state of competition for the delivery of video programming, significant now, portends to be even more vigorous in the near future.

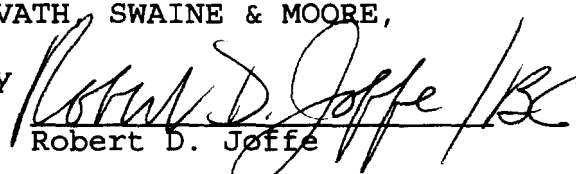
July 29, 1994

Respectfully submitted,

WILLKIE FARR & GALLAGHER  
Brian Conboy  
Theodore Case Whitehouse  
Three Lafayette Center  
1155 21st Street, N.W.  
Washington, D.C. 20036

CRAVATH, SWAINE & MOORE,

by

  
Robert D. Joffe

Worldwide Plaza  
825 Eighth Avenue  
New York, N.Y. 10019

Attorneys for Time Warner Cable